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RECORD, CASE NO. 15075.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 1105.

WILLIAM DOUGLASS CROSS, APPELLANT,

vs.

JEROME B. BURKE, WARDEN OF THE JAIL FOR THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 6, 1892.

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A

Caption.

In the supreme court of the District of Columbia.

189. Habeas corpus. In the matter of the application of William Douglass Cross for a writ of habeas corpus.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 [Filed May 28, 1892. J. R. Young, clerk.]

In the supreme court of the District of Columbia.

189. Habeas corpus. In the matter of the application of William Douglass Cross for a writ of habeas corpus.

Petition for writ.

To the supreme court of the District of Columbia:

The petitioner, William Douglass Cross, a citizen of the United States, and a resident of the District of Columbia, respectfully shows that he is unlawfully deprived of his liberty, and unlawfully imprisoned, confined, and detained in the United States jail, in the county of Washington and District of Columbia, by Jerome B. Burke, the warden of the said jail, and asks that he be discharged and set at liberty.

That the said imprisonment, detention, confinement, and restraint are illegal, and that the illegality thereof consists in this, to wit:

1. On the 7th day of July, 1891, at a special term of the supreme court of the District of Columbia, holding a court for criminal business, this petitioner was, by a verdict of a jury, convicted of murder.

2. That thereafter he filed a motion for a new trial, which was heard and overruled, and on, to wit, the 30th day of July, 1891, judgment and sentence were pronounced against him by Hon. A. C. Bradley, the justice, holding said special term for criminal business, in the following words:

"It is considered that for his said offense the defendant be taken by the warden aforesaid to the jail from whence he came, and there to be kept in close confinement, and that upon Friday, the 22d day of January, in the year of our Lord one thousand eight hundred and ninety-two, he be taken to the place prepared for his execution, within the walls of the said jail, and that there, between the hours of eight o'clock ante-meridian and twelve o'clock meridian of the same day, he be hanged by the neck until he be dead, and may God have mercy upon his soul."

3 3. Petitioner further says, as he is informed by counsel and verily believes, that an appeal was taken from said special term to the general term of the supreme court of the District of Columbia, and on January 12th, 1892, said supreme court in general term affirmed the judgment of the special term, in the following words:

"Because it appears to the court here that there is no error in the record and proceedings, or in the judgment of the special term in this cause, it is considered by the court here that the said judgment be and the same hereby is affirmed."

4. Petitioner further states, as he is informed by counsel and verily believes, that a death warrant was, on the 12th day of January,
4 1892, issued for his execution to take place on the 22d day of January, 1892, and that no return of said warrant has ever been made.

5. Petitioner further says that, as he is informed by counsel and verily believes, while he was in jail awaiting execution, the chief justice of the supreme court of the District of Columbia allowed a writ of error to the Supreme Court of the United States.

6. Petitioner further states, as he is informed by counsel and verily believes, that on the 21st day of January, 1892, the supreme court of the District of Columbia in general term, in the absence of the petitioner, postponed the day of his execution as fixed by Justice Bradley in the special term, and in his absence resentenced him to be hanged on Friday the 10th day of June, 1892, between the same hours specified in the said judgment of the said special term.

5 7. Petitioner further says, as he is informed by counsel and verily believes, that on the 16th day of May, 1892, the Supreme Court of the United States refused to entertain the writ of error and dismissed the same, holding that the act of February 6th, 1889, did not authorize the issue of the writ, as will more fully appear on reference to the opinion of said court, a copy of which is hereunto annexed, marked "A," and forms a part of this petition.

8. Petitioner further says, as he is informed by counsel and verily believes, that from the day upon which sentence was pronounced by Justice Bradley, to wit, July 30, 1891, until the day fixed for his execution, to wit, January 22nd, 1892, the warden of the United States jail held and detained him as a prisoner under and by virtue of the said sentence.

6 9. Petitioner further says, as he is informed by counsel and verily believes, that after the day fixed for his execution, to wit, January 22nd, 1892, said warden has claimed the right to hold and detain this petitioner as a prisoner under and by virtue of an order of the supreme court of the District of Columbia, in general term, postponing his execution and resentencing him to be hanged June 10th, 1892, in the following words:

"That the execution of the sentence of death pronounced against the defendant by the special term of this court on the thirtieth day of July, in the year of our Lord one thousand eight hundred and ninety-one, to take place on the twenty-second day of January, 1892, be, and the same is hereby, postponed until the tenth day of June, 1892, between the same hours specified in the said judgment of the said special term."

7 10. Your petitioner further avers, as he is informed by counsel and verily believes, that section 1040 Revised Statutes U. S., under which the court in general term postponed the execution of the sentence, provides for cases carried to the Supreme Court of the United States, and directs what shall be done in such cases by the court rendering the judgment. It is provided that in case of affirmance the court rendering the judgment shall appoint a day for execution. All this is in cases which are "carried to the Supreme Court in pursuance of law. The case of your petitioner has been decided not to have been so carried to the Supreme Court. The result, in contemplation of law, is that it never was in that court. Con-

sequently the case not being such as is contemplated by said section 1040, the supreme court of the District of Columbia was without authority to change the date of execution. As the date lawfully fixed, to wit,
8 January 22nd, 1892, has passed, and a new date was not lawfully fixed, and no other date can be fixed, your petitioner is advised that he is detained and imprisoned without authority of law.

11. Petitioner further says, as he is informed by counsel and verily believes, that, since the dismissal of the writ of error by the Supreme Court of the United States on the 16th day of May, 1892, and the opinion of that court delaring that the allowance of said writ of error was ultra vires, without jurisdiction and null and void; and, as a necessary consequence, that the order of the supreme court of the District of Columbia in general term postponing the execution of this petitioner and re-sentencing him to be hanged at a later day was also ultra vires, without jurisdiction,
9 and null and void; that said warden has, since said decision, unlawfully detained and held this petitioner as a prisoner without any lawful warrant, and still so unlawfully detains and holds him.

12. Petitioner further says, as he is informed by counsel and verily believes, that there is now no power, jurisdiction, or authority vested in any court to re-sentence this petitioner, or fix another day for his execution.

13. Petitioner further says, as he informed by counsel and verily believes, that the authority of the warden of the United States jail to detain him as a prisoner expired January 22nd, 1892; and that since that day said warden has unlawfully kept and detained this petitioner as a prisoner without due process of law, and in violation of the Constitution of the United States.

10 Wherefore your petitioner prays that a writ of habeas corpus issue to Jerome B. Burke, the warden of the United States jail in the District of Columbia, commanding him to produce the body of this petitioner in court forthwith, together with the cause of his detention as a prisoner by said warden; and that said petitioner may be discharged and set at liberty.

DISTRICT OF COLUMBIA, *ss:*

William Douglass Cross, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition by him subscribed; that he has heard read the same and knows the contents thereof and that the facts therein stated of his own knowledge are true, and those stated upon information and belief he believes to be true.

his
WILLIAM DOUGLASS × CROSS.
mark.

11 Witness to mark:
ALBERT H. SHILLINGTON.

Sworn and subscribed to before me this 27th day of May, A. D. 1892.

[NOTARIAL SEAL.] ALBERT H. SHILLINGTON,
Notary Public.

CHAS. MAURICE SMITH, and
JOSEPH SHILLINGTON,
Counsel for the Petitioner.

12 A.

Supreme Court of the United States.

No. 1525, October Term, 1891.

WILLIAM D. CROSS, PLAINTIFF IN ERROR, *vs.* THE UNITED STATES. } In error to the supreme court of the District of Columbia.

[May 16, 1892.]

Mr. Chief Justice Fuller delivered the opinion of the court:

William D. Cross was tried upon an indictment for murder in the supreme court of the District of Columbia, holding a criminal term, in March, 1890, and a verdict of guilty having been returned and a motion for a new trial heard and overruled, was sentenced to death. He thereupon prosecuted an appeal to the court in general term, which reversed the conviction and granted a new trial. (19 Dist. Col. Rep., 562.)

13 A second trial was had at the June, 1891, special criminal term, which again resulted in a verdict of guilty, and, a motion for a new trial having been made and overruled, he was, July 30, 1891, sentenced to be executed January 22, 1892.

From this conviction he prosecuted an appeal to the court in general term, which, on January 12, 1892, finding no error in the record, affirmed the judgment. The opinion, by Cox, J., will be found in 20 Washington Law Rep., 98.

On January 21 a writ of error from this court was allowed, on petition, by the chief justice of that court, citation was signed and served, and the time for filing the record enlarged.

On the same day an order was entered by the court in general term, "that the execution of the sentence of death pronounced against the defendant by the special term of this court on the thirtieth day of July, in the year of our Lord one thousand eight hundred and ninety-one,

14 to take place on the twenty-second day of January, 1892, be, and the same is hereby, postponed until the tenth day of June, 1892, between the same hours specified in the said judgment of the said special term."

The case comes before us on motion to dismiss the writ of error.

Under acts of Congress, the supreme court of the District of Columbia consists of one chief justice and six associate justices, appointed by the President, by and with the advice and consent of the Senate, and holding their office during good behavior. Special and general terms of the court, and appeals from the former to the latter, are provided for. General terms may be held by three justices, two constituting a quorum, while special terms are held by one justice. Any one of the justices may hold a criminal court for the trial of all crimes and offences arising in the District. (Rev. Stat. Dist. Col., §§ 750, 753, 754, 757, 762, 763, 772; 19 Stat., 240, c. 69, § 2; 20 Stat., 320, c. 99, § 1.)

15 By the act of July 7, 1838 (5 Stat., 306), a criminal court was established in the District of Columbia, and it was held in ex parte Bradley, 7 Wall., 364, at our December term, 1868, that under the act of

March 3, 1863 (12 Stat., 762), by which the courts of the District were reorganized, the criminal court still remained a separate and independent court, although held by a justice of the supreme court of the District created by the act, and that the only jurisdiction of the supreme court in criminal cases was in an appellate form. But by the act of June 21, 1870 (16 Stat., 160), it was provided, as now embodied in section 753 of the Revised Statutes of the District, that the several general terms and special terms of the various courts, circuit, district, and criminal, should be considered terms of the supreme court of the District, and that the judgments, decrees, sentences, &c., of the general terms and of the special
16 terms and of the various courts should be the judgments, decrees, sentences, &c., of the supreme court, but that this should not affect the right of appeal as provided by law.

Section 772 reads: "Any party aggrieved by any order, judgment, or decree made or pronounced at any special term may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the supreme court, and upon such appeal the general term shall review such order, judgment, or decree, and affirm, reverse, or modify the same, as shall be just."

And under section 770: "The supreme court in general term shall adopt such rules as it may think proper to regulate the time and manner of making appeals from the special term to the general term," &c.

The act of February 25, 1879 (20 Stat., 320, c. 99) forbade any justice to sit in general term to hear an appeal from any judgment or decree or order which he may have rendered at special term.

17 By the act of 1838 a writ of error lay to the criminal court from the circuit court of the district, and postponement of execution in capital cases was provided for, and this was carried into § 845 of the District Revised Statutes.

The supreme court sitting at special term and the supreme court sitting in general term are the same tribunal, but the court in general term exercises appellate powers and is an appellate court, although it may also exercise jurisdiction in hearing matters in the first instance (R. S. Dist. Col., §§ 770, 800), and the final judgments or decrees which may be brought here by appeal or writ of error are those rendered by the general term. Such review may be had when the matter in dispute exceeds $5,000 (R. S., § 705; 20 Stat., 320, c. 99, § 4; 23 Stat., 443, c. 355, § 1; R. S. D. C., §§ 846, 847), but necessarily this does not apply to criminal cases.

The language of sections 846, 847 of the Revised Statutes of the
18 District of Columbia in reference to the re-examination of the final orders, judgments, or decrees of the supreme court of the District is taken from the act of March 3, 1863 (12 Stat., 762, 764, § 11), which was itself adopted from section 8 of the act of February 27, 1801 (2 Stat., 103), repeated in the act of March 3, 1879 (20 Stat., 320, § 4), and referred to in the act of March 3, 1885 (23 Stat., 443), and is always coupled with the provision that the appellate jurisdiction should not be exercised except where the matter in dispute exceeds a certain sum, or, under the act of 1885, where the validity of a patent or copyright is involved, or the validity of a treaty or statute of or authority exercised under the United States is drawn in question.

We have, of course, no general authority to review, on error or appeal, the judgments of the circuit courts of the United States in cases
19 within their criminal jurisdiction, or those of the supreme court of the District of Columbia or of the Territories; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language. Farnsworth v. Montana, 129 U. S., 104; United States v. Sanges, 144 U. S., 310, 320; United States v. More, 3 Cranch, 159. United States v. More was decided in February, 1805, and from that time it has been assumed that criminal cases could not be brought from the courts of the District to this court.

In such cases, remarked Mr. Justice Miller, in ex parte Bigelow, 113 U. S., 328, 329, "the act of Congress has made the judgment of that court conclusive, as it had a right to do, and the defendant having one review of his trial and judgment has no special reason to complain."

By sections 651 and 697 of the Revised Statutes provision was made for a review of questions arising in criminal cases under certificates of
20 division of opinion, and this was so provided as early as 1802. (Act April 29, 1802, § 6, 2 Stat., 156, 159.) But this provision has never been supposed to refer to the courts of the District of Columbia.

By section five of the judiciary act of March 3, 1891 (26 Stat., 826, c. 517), it is provided that appeals and writs of error may be taken "from the district courts or from the existing circuit courts directly to this court in cases of conviction of a capital or otherwise infamous crime;" and we have been constrained to hold that the judgments of the supreme court of the District of Columbia in criminal cases are not embraced by the provisions of that section. In re Heath, petitioner, 144 U. S., 92. Unless, therefore, as is, indeed, not disputed, this writ of error comes within the act of Congress of February 6, 1889, entitled "An act to abolish circuit court powers of certain district courts of the United States and to
21 provide for writs of error in capital cases, and for other purposes" (25 Stat., 655), it can not be maintained. This act contains seven sections, of which the first five relate, in substance, to the establishment of circuit courts for the eastern district of Arkansas, the northern district of Mississippi, and the western district of South Carolina, and the withdrawal of circuit court powers from certain district courts. The seventh provides when the act shall take effect.

Section six is as follows: That hereafter in all cases of conviction of crime, the punishment of which provided by law is death, tried before any court of the United States the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe.

22 Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file, and docket the same. Every such writ of error shall during

its pendency operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to the term named in the citation as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of
23 either party. When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings, in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record." Taking the sixth section in connection with the others, it would be quite within accepted rules of construction to con-
24 clude that it refers only to circuit and district courts of the United States, and this is worthy of mention, though not the ground of our decision.

It is contended on behalf of the Government that the writ of error will not lie, because the supreme court of the District of Columbia is not a court of the United States within the intent and meaning of the section. McAllister v. United States, 141 U. S., 174, is cited with the decisions referred to therein as sustaining that view, but it is to be remembered that that case referred to Territorial courts only, and, moreover, if the disposal of the motion turned on this point, the words "any court of the United States" are so comprehensive that, used as they are in connection with convictions subject to the penalty of death, the conclusion might be too technical that Congress intended to distinguish between courts of
25 one class and of the other. But the difficulty with the section is that it manifestly does not contemplate the allowance of a writ of error to any appellate tribunal, but only to review the final judgment of the court before which the respondent was tried, where such judgment could not otherwise be reviewed by writ of error or appeal. It is the final judgment of the trial court that may be re-examined upon the application of the respondent, and it is to that court the cause is to be remanded and by that court that the judgment of this court is to be carried into execution. The obvious object was to secure a review by some other court than that which passed upon the case at nisi prius. Such review by two other courts was not within the intention, as the judiciary act of March 3, 1891, shows. This is made still clearer by the further provision that no such writ of error "shall be sued out or granted unless a petition there-
26 for shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may, for cause, allow by order entered of record." This language is entirely inapplicable to the prosecution of a writ of error to the judgment of an appellate tribunal affirming the judgment of the trial court. And the case before us shows this.

The supreme court of the District of Columbia, sitting in general term in review of the sentences of the criminal court held by one of the justices, occupies the same position as any other court with appellate jurisdiction. It has in this case affirmed the judgment of the criminal court. The writ of error from this court was not granted upon a petition filed during the term, or within sixty days next after the expiration of the term,
27 of the court at which the trial was had and sentence pronounced, yet the statute is explicit that no such writ of error shall be sued out or granted unless thus applied for. (Ball v. United States, 140 U. S., 118, 129.) What happened here would happen in most, if not all, cases if appellate tribunals were embraced by the section. Compliance with the law would be well nigh, if not altogether, impossible.

It is to be observed that the writ runs to the judgment of the general term, yet if this man goes to his death it is not by force of the judgment of the general term, but of the sentence of the criminal term. The court in general term did indeed postpone the execution of the sentence to another day, a postponement rendered necessary by the granting of this writ, but its judgment was one of affirmance merely. We have recently
28 had occasion to consider the distinction between such a judgment and the original sentence in Schwab v. Berggren and Fielden v. Illinois, 143 U. S., 443, 452. It was ruled in those cases that the presence of defendants condemned to death was not essential when the judgments were affirmed against them by the appellate court, and that the sentences were not vacated by the writs of error, but only their execution stayed pending proceedings in the higher court. The supreme court of Illinois, under statutory authority, fixed another day when the punishment prescribed by the judgments which it affirmed should be inflicted, but it was held that that did not affect the question raised, as no resentence was required, and, besides, that the time and place of execution were not strictly parts of the judgment or sentence unless made so by statute. (143 U. S., 452.)

29 In the light of these considerations we cannot entertain any other view of the purview of this section than that above expressed. We are of opinion that the act of February 6, 1889, did not authorize the issue of this writ, which we are therefore compelled to dismiss.

True copy.
Test:

Clerk Supreme Court U. S.

This petition is certified to the court in gen'l term to be then heard in the first instance.
May 28, '92.

M. V. MONTGOMERY,
Justice.

30 [Filed Jun. 6, 1892. J. R. Young, clerk.]

In the supreme court of the District of Columbia.

In general term.

No. 189. Habeas corpus docket. In the matter of the petition of William D. Cross for a writ of habeas corpus.

The petition of the above named William D. Cross, having been certified to this court to be heard in the first instance, upon consideration thereof, the court being of opinion that no cause appears from the matters stated in the said petition why said Cross should be discharged from custody, and it appearing from the matters set forth in the said petition that the petitioner is lawfully in custody, it is, this 4th day of June, A. D. 1892,

ordered and adjudged that the prayer of the said petitioner for
31 said writ of habeas corpus be refused, and said petition is hereby dismissed, from which the petitioner gave notice of an appeal to the Supreme Court of the United States.

By the court.

E. F. BINGHAM, *C. J.*

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32 [Filed Jun. 15, 1892. J. R. Young, clerk.]

Supreme court of the District of Columbia.

In general term.

Ex parte William Cross.

James, Justice, delivered the opinion of the court:

This is an application for a writ of habeas corpus, on the ground that the day set by the criminal court for the execution of the prisoner has passed, and that this court has no power to set another day when it postponed the execution.

In the supreme court held that the time and place of execution of a sentence of death were not parts of the judgment or sentence, unless made so by statute. It is unnecessary to refer to any other authority, but it may be added that a more explanatory statement of that rule was made by Chief Justice Parker, in Howard ex parte, 17 New Ham. 548.

"The judgment of the court," he said, "consists of the sentence
33 of death. With it is an order designating the time when the sentence is to be carried into execution. The order is not, strictly speaking, a part of the judgment, although usually entered with it."

It is not denied on the part of the prisoner that this is the rule at common law, but it is claimed that in this district the time of execution has been made a part of the sentence by statute. We are referred to section 845 of the Revised Statutes, Dis. Col., which is in the following words:

"To enable any person convicted by the judgment of the court to apply for a writ of error, in all cases when the judgment shall be death or con-

finement in the penitentiary, the court shall, on application of the party accused, postpone the final execution thereof to a reasonable time beyond the next term of the court, not exceeding in any case thirty
34 days after the end of such term."

This section was taken from section 6 of the act of 7 July, 1838, 5th Stat. at Large, 307, which was passed before the establishment of this court. As the language of the revision is uncertan in reference to the court beyond, whose next term the execution was to be postponed, we recur to the original statute, which was in the following words:

"Sec. 6. * * That to enable the person connected by the judgment of the said criminal court to apply for a writ of error in all cases when the judgment shall be death or confinement in the penitentiary, the said criminal court shall, on application of the party accused, postpone the final execution thereof to a reasonable time beyond the next term of said circuit court, not exceeding in any case thirty days after the end of such term of the circuit court."

35 We understand the contention on the part of the prisoner, to be that the time fixed by this postponement is to be regarded as a time fixed by statute for the execution, and that the power of the court to set a day for execution is exhausted when such action is had.

Before we consider the effect of this provision on the power of the criminal court to meet the exigenc'es of a case by setting a new day, it may be remarked that it illustrates perfectly the distinction between the sentence of death and the order fixing the time for carrying that sentence into execution. This very statute makes them separate in the case provided for. The writ of error would be taken of course, to a judgment. Thus it was contemplated that there should first be a judgment or sentence of death or imprisonment and then an application by the accused for
36 postponement of execution thereof, and that the postponed time was in case of such application to be fixed by a subsequent and separate order.

The contention that this setting of a postponed day constituted an absolute fixing of the time of execution and exhausted the power of the court in the matter of fixing the time, would be maintainable only on the theory that it was the intent of this statute to dispose of the whole subject of the power of the court in reference to setting a time for execution, and that whatever was not included in this statement of *of* power was excluded. The answer to such a contention is, that the subject matter dealt with in this provision was not the powers of the court at all; it related simply to a right of the accused in a particular instance; that is, his right to a
37 postponement of the time of executing his sentence in case he should apply for it in order to have a review of alleged error. With the exception of this restriction in the matter of fixing a day for execution, the power of the court was not made the subject of legislation, but was left as it had been at common law. The whole effect of the statute was to declare that in case of an application for the purpose of obtaining a review on error, the day of execution should not be set so as to cut off the opportunity for review and possible reversal.

The prisoner's contention this proceeding exhausts the power to set a day may be tested in this way: If it should happen that a case should not be disposed of on the review before the expiration of the postponed time,

the result of this contention would be that execution could not
38 be carried out, even if the sentence should be affirmed. This result would follow if this statute cuts off the power to set a new day when the time first set has elapsed. The unreasonableness of such a result shows that this statute was not intended to cut off the power to set a new day in case it should be necessary.

The que-tion then is, what was the power of the court by the common law? On this question we refer again to the opinion already cited. "There may be," said Chief Justice Parker, "a failure to execute the order at the time prescribed, from various causes; providential occurrences, riots, wil'ful default of the sheriff. Neither of these can operate as a pardon, or give the prisoner a right to be discharged.
39 The sentence still remains in force. If it has been stayed by a reprieve, it is to be executed at the end of the time specified in the reprieve. * * If from these, or any other causes, the time prescribed for execution has passed, the court must make a new order if no other disposition has been made of the case." (17 New H., 548.)

It is not material to consider whether the postponement ordered by this court, pending the review, amounted to an affirmative appointment of a day for execution, and whether this court had power to fix a day.

It is enough that such a power still exists somewhere. We hold that the criminal court has ample power to make such an order. It follows that the convict is not entitled to a discharge.

The application for a writ of habeas corpus is therefore denied.

JAMES, *J.*

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40 [Filed June 8, 1892. J. R. Young, clerk.]

In the supreme court of the District of Columbia.

No. 189.—In the matter of William Douglass Cross on habeas corpus.

On motion of Charles Maurice Smith and Joseph Shillington, attorneys for said petitioner, it is ordered that an appeal to the Supreme Court of the United States from the judgment entered herein be, and the same hereby is, granted, and that a certified transcript of the record and all proceedings in the above entitled matter be forthwith transmitted to the Supreme Court of the United States.

E. F. BINGHAM, *C. J.*

---

41 *Citation.*

To the Supreme Court of the United States.

The United States of America, greeting.

To Jerome B. Burke, warden of the jail for the District of Columbia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to an order of the supreme court of

the District of Columbia made and entered on the 4th day of June, 1892, allowing an appeal from the judgment and order of remand rendered and entered on the 4th day of June, 1892, in the matter of William Douglass Cross on habeas corpus, to show cause, if any there be, why the errors in said matter mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety-two.

E. F BINGHAM,
Chief Justice.

41½ Habeas corpus, No. 189.

Served copy of the within writ on J. B. Burke, warden U. S. jail, D. C., June 11, 1892.

D. M. RANSDELL,
Marshal.

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42 [Filed Jun. 27, 1892. J. R. Young, clerk.]

In the Supreme Court of the United States, of October term, in the year of our Lord one thousand eight hundred and ninety-two.

Assignment of errors.

WILLIAM DOUGLASS CROSS, APPEL'ANT,
vs.
JEROME B. BURKE, WARDEN OF THE JAIL OF the District of Columbia, respondent.

Afterwards, to wit, on this 27th day of June, 1892, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said William Douglass Cross, by Charles Maurice Smith and Joseph Shillington, his attorneys, and says that in this record aforesaid there is a manifest error in this, to wit:

That the said supreme court of the District of Columbia in general term erred in deciding—

43 1. That the appel'ant is not unlawfully restrained of his liberty.

2. That the appel'ant is not unlawfully detained in the jail of the District of Columbia by Jerome B. Burke, the warden of said jail.

3. That the appel'ant was not entitled to a writ of habeas corpus upon the showing made in his petition.

And the said William Douglass Cross prays that the said judgment entered herein against him be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he has lost by occasion of the said judgment.

CHAS. MAURICE SMITH,
JOSEPH SHILLINGTON,
Attorneys for Appellant.

44 UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the petition of William Douglass Cross for a writ of habeas corpus as the same remain upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court this 1st day of July, A. D. 1892.

[SEAL.] J. R. YOUNG,
Clerk.

(Indorsement on cover:) Case No. 15075. Term No. 1105. William Douglass Cross, appellant, vs. Jerome B. Burke, warden of the jail for the District of Columbia. District of Columbia supreme court. Filed July 6, 1892. Supreme Court U. S., clerk's office. Received Jul. 2.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 1105.

WILLIAM DOUGLASS CROSS, Appellant,

vs.

JEROME B. BURKE, Warden of the Jail of the District of Columbia.

BRIEF IN BEHALF OF APPELLANT.

CHAS. MAURICE SMITH,
JOSEPH SHILLINGTON,
Counsel for the Appellant.

Law Reporter Print.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1892.

WILLIAM DOUGLASS CROSS, APPELLANT,

vs.

JEROME B. BURKE, WARDEN OF THE JAIL OF THE DISTRICT OF COLUMBIA, APPELLEE.

No. 1105.

The appellant, William Douglass Cross, was convicted of murder July 7, 1891, at a special term of the Supreme Court of the District of Columbia, held for criminal business. At the same special term of the court a motion was made for a new trial, before the justice presiding at the trial, and was overruled, and said appellant was thereupon sentenced, on the 30th day of July, 1891, to be hanged January 22, 1892, within the walls of the District jail.

An appeal was taken from this sentence to the General Term of the Supreme Court of the District of Columbia, and on the 12th day of January, 1892, the said General Term of the Supreme Court of the District of Columbia affirmed the conviction.

An appeal was noted, and a writ of error to the Supreme Court of the United States was allowed by the Chief Justice of the Supreme Court of the District of Columbia to the Supreme Court of the United States on the day of January, 1892.

On the 21st day of January, 1892, the General Term of the Supreme Court of the District of Columbia postponed the execution of the sentence of death to June 10, 1892.

During the October, 1891, term of the Supreme Court of the United States, a motion was made by the Solicitor General of the United States to dismiss the writ of error on the ground that the United States Supreme Court had no jurisdiction of the same, under the Act of February 6, 1889, and during the same term of the court the motion of the Solicitor General was granted, and the writ of error was dismissed for want of jurisdiction.

Application for a writ of habeas corpus was, on the 28th day of May, 1892, made to the Supreme Court of the District of Columbia, on the ground that the General Term of the Supreme Court of the District of Columbia had no power to change the day of execution, and that the time having expired within which the special term of said court could postpone said sentence, under section 845 of the Revised Statutes of the District of Columbia, that there is now no power in any court to postpone said sentence, or by which said appellant can be resentenced.

Said application was on the ——day of May, 1892, certified by Mr. Justice Montgomery in special term, to be heard in the first instance in the General Term of the Supreme Court of the District of Columbia.

On the 8th day of June, 1892, said court in General Term denied the application for a writ of habeas corpus and said in the course of its judgment:

> "It is not material to consider whether the postponement ordered by this court pending the review, amounted to an affirmative appointment of a day for execution, and whether this court had power to fix a day. It is enough that such a power still exists somewhere. We hold that the Criminal Court has ample power to make such an order. It follows that the convict is not entitled to a discharge."

From this decision of the Supreme Court of the District of Columbia an appeal was taken to the Supreme Court of the United States on the 8th day of June, 1892.

On this appeal but one question, namely, whether time and place is an essential and necessary part of the judgment, or sentence of death, remains to be passed upon by this court. It is admitted by appellant that under the common law, time and place formed no part of the judgment or sentence of death, and that the same holds good in all places and States of the United States, except where it has been changed by legislative enactment.

Under the common law, the judgment or sentence of the court was *suspendatur per collum* (no time or place of execution being mentioned or designated,) and said sentence of the court was duly carried into effect by the sheriff at such time and place as best suited his convenience.

Later as civilization advanced and justice became administered in a more enlightened manner, courts generally fixed upon a time and place for carrying into effect the execution of a convict, although, at that time, time and place, formed no part of the judgment until it was made so by legislative action, and during all this time under the common law the right to postpone the sentence of death rested in the court.

See Hawkins, P. C., b. 2, 51 s., 8.

From the time of the cession of the present District of Columbia to the United States by the State of Maryland up to July 7, 1838, the common law method prevailed in the District of Columbia.

Under the old common law system the court had power to postpone the sentence of execution for any indefinite time, and at its own pleasure, or, *per contra*, might order an immediate execution of the convict; and, under the same system, the execution was usually carried into effect by the sheriff in a place where the general public might be present and witness the same.

In order to deprive the courts of such unlimited power over convicts sentenced to death, and also to prevent a curious public from being present at an execution of a convict, the Congress of the United States has followed a rule laid down by the legislatures of almost all of the States of the Union and made time and place a part of the judgment or sentence of death.

In regulating criminal practice in the District of Columbia, section 845 of the Revised Statutes of the United States relating to the District, regarding the time of execution, reads as follows:

> "To enable any person convicted by the judgment of the court, to apply for a writ of error, in all cases where the judgment shall be death, or confinement in the penitentiary, the court shall, on application of the party accused, postpone the final execution thereof to a reasonable time beyond the next term of the court, not exceeding in any case thirty days after the end of such term."

In the same connection, as to the place of execution, section 1093 of the Revised Statutes of the District of Columbia reads as follows:

> "Persons adjudged to suffer death shall be executed within the walls of some prison in the District, or within a yard or enclosure adjoining such prison, and not elsewhere."

In construing section 845 above mentioned, the first question to be considered is, is there any ambiguity in the provision of the same. On the part of the appellant, it is maintained that its language is clear and unambiguous.

When the words of a statute are plainly expressive of an intent not rendered dubious by the context, it matters not what the consequences may be, however unjust, arbitrary,

or inconsistent the intention may be, it must receive its full effect.

Douglass *vs.* Chosen F., h. d.'s, 38 N. J. L., 214.
Bradbury *vs.* Wagenhurst, 54 Penn. State, 182 S. P.
U. S. *vs* Warner, 4 McClean, 463.
U. S. *vs.* Ragsdale, Hemps., 497.
Johnson *vs.* RR. Co., 49 N. Y., 455.
People *vs.* Shoonmaker, 63 Barb, N. Y., 49.
State *vs.* Washoe Co., 6 Nev., 104.
Hyatt *vs.* Taylor, 42 N. Y., 259.
Benton *vs.* Wickwire, 54 N. Y., 226.
Rogers *vs.* Goodwin, 2 Mass., 475.
Langdon *vs* Potter, 3 Mass., 215 and 221.
Putnam *vs.* Longley, 11 Pick., (Mass.) 487, 490.

In this connection (1 T. R., 313, 314), Lord Mansfield said:

> "Whatever doubts I may have in my own breast with respect to the policy and expediency of this law, yet, as long as it continues in force, I am bound to see it executed according to its meaning."

See also—
Smith *vs.* State, 66 Md., 215, 217 S. P.

Though the consequences should be to defeat the object of the act, a construction not supported by the language of it cannot be imposed by the court in order to effectuate what it may suppose to be the intention of the legislature.

Frye *vs.* RR. Co., 73 Ill., 399.
Leoni *vs.* Taylor, 20 Mich., 148.
Rex *vs.* Barham, 8 B. & C., 99.
R. *vs.* Stoke Darnard, 7 B. & C., 569
Ezekiel *vs.* Dixon, 3 Ga., 146.

When words admit of but meaning, a court is not at liberty to speculate on the intention of the legislature or to

construe an act according to its own notion of what ought to have been enacted.

York & N Mid. R. Co. *vs.* R., 1 E. & B., 864.
22 L. J., 2 B., 230.

And to depart from the meaning is not to construe an act, but to alter it.

Gynne *vs.* Bronell, 6 Bing. N. C., 56.
33 L. J. Ch., 373.
Allkins *vs.* Jupe, L. R., 2 C. P., 385.

It is not for courts of justice *proprio marte* to provide for all of the defects or mischiefs of imperfect legislation.

Smith *vs.* Rues, 2 Sumn., 354.

Even when the construction of an act is doubtful, one long acted upon by the inferior courts will generally be adopted by the superior tribunal.

Plummer *vs.* Plummer, 37 Miss., 185.
Clark *vs.* Botler, 54 Pa. St., 215.

The meaning publicly given to a statute by long usage is presumed to be the true one.

Co. Litt., 86.
Sheppard *vs.* Gosnold, Vaugh., 169.
Leigh *vs.* Kent, 3 T. R., 364.
Blankley *vs.* Winstanley, 3 T. R., 286.
Clift *vs.* Schwabe, 3 C. B., 469.
Newcastle *vs.* Attorney General, 12 Cl. & F., 419.
Attorney General *vs.* Jones, 2 H. & C., 347.

If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by a long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice.

Packard *vs.* Richardson, 17 Mass., 121.
McKean *vs.* Delancey, 5 Cranch, 22.
Hahn *vs.* U. S., 107 U. S., 402.
Steiner *vs.* Coxe, 4 Pa. St., 13, 28.
Kenion *vs.* Hill, 1 La. An., 419.
Sherwin *vs.* Bugbee, 16 Vt., 444.

"Where the language is obscure," said Lord Campbell, "instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long continued usage. There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken as to the true meaning of an old act of Parliament."

Gorham *vs.* Bf. of Exeter, 15, 2, B. 73.

See also Hebbert *vs.* Purchas., L. R., 3 P. C. 650.

If we find an uniform interpretation of a statute adhered to, without interruption it would be impossible to disregard that interpretation.

Morgan *vs.* Crawshay, L. R., 5 H. L., 304, 320.

When doubtful words have received the same interpretation in a succession of cases, and the legislature has not expressed its dissent by other positive enactment, the court will consider themselves bound to adopt that meaning.

Wilb., p. 147.

Bishop Wr. L. Sec. 104, A.

When the words of an old statute are either transcribed into, or made part of a new statute, this is understood to be done with the object of adopting a legal interpretation which has been put on them by the court.

Dalis case, 6 Q. B. D., 453.

The re-enactment of a statute which has received a judicial construction, in the same, or substantially the same, terms, amounts to a legislative adoption of such construction, whether such re-enactment is by way of an isolated and independent statute, or the incorporation of several former statutes into one, or their incorporation in a code or revision of statutes.

Duramus *vs.* Hamson, 26 Ala., 326.

Bank of Mobile *vs.* Meagher, 33 Ala., 622.

Woolsey *vs.* Cade, 54 Ala., 378.

Knight *vs.* Ocean Co., 10 Centr. Rep., 653.

La Sille *vs.* Whitfield, 12 La. An., 81.

Myrick *vs.* Hasey, 27 Me., 9.
Tuxbury's App., 66 Me., 267.
State *vs.* Swope, 7 Ind., 91.
Gould *vs.* Wise, 18 Nev., 253.
McKenzie *vs.* State, 11 Ark., 594.
State *vs.* Stockley, 11 West. Rep., 259.
Bent. *vs.* Hubbardston, 138 Mass., 99.

A body of revised laws should, it is said, be regarded as a system of contemporaneous acts, and its various sections relating to the same subject should, if practicable, be construed together, and one chapter is to be read with another relating to the same subject as one body of law, though collected from independent laws of previous enactment, originally passed at different times, and re-enacted by a revisory act. If possible, the various portions of such a code or revision must be so construed as to harmonize with one another.

Ex parte Ray, 45 Ala., 15.
Bryant *vs.* Livermore, 20 Minn., 313.
Smith *vs.* Smith, 19 Wis., 522.
Gallegos *vs.* Pino, 1 N. M., 410.
O'Neill *vs.* Robinson, 45 Ala., 526.
Mobile &c., RR. Co. *vs.* Malone, 46 Ala., 391.
Ashley *vs.* Harrington, 1 D. Chip (Vt.) 348.
Gibbons *vs.* Brittemine, 56 Mass., 232.
Commonwealth *vs.* Goding, 3 Metc. (Mass.), 130.

Acts in *pari materia* must be construed with reference to each other, and the provisions of statutes are to be construed in connection with other acts relating to the same subject-matter, and not only is the later act construed by the light of the earlier, but it sometimes furnishes a legislative interpretation of the earlier.

U. S. *vs.* Freeman, 3 How., 56.
Georgia Pen. Co. *vs.* Helms, 65 Ga., 67.

It must be apparent to the court that sections 845 and 1093 of the Revised Statutes of the District of Columbia must be construed together, as they relate to the same subject-matter, and are in no wise repugnant to each other, and it is insisted in this connection that, if the court had sentenced the prisoner to be hanged on a certain day without specifying any place where the execution should take place, such sentence would be null and void, and, per contra, if the time was omitted in the sentence, it would likewise render it null and void.

The opinion of the General Term of the Supreme Court of the District of Columbia, in refusing to grant the application for a writ of habeas corpus in substance, held that the whole matter was left where it was at common law, and herein it is maintained that the error of the court was made, and also that time and place are vital and essential parts of the judgment or sentence of death, having been made so by the statutes.

The General Term of the Supreme Court of the District of Columbia also was in error when it held that section 845 related solely to rights given to the appellant, and in nowise affected the powers or jurisdiction of the court.

The statute deals not only with the right of the appellant to appeal, but also in positive and mandatory terms as to the power of the court to postpone the final execution of the sentence of death, and furthermore negatives any other action on the part of the court.

The language of this statute is not only mandatory as to the powers of the court, but also limits its power to fix the time for the final execution thereof to a reasonable time beyond the next term of the court (meaning the General Term of the court), but in language emphatic and negative directs said court to postpone the sentence in no case for more than thirty days beyond the next term of the court.

Upon the subject of peremptory language of an act the court is referred to the following authorities:

Devaine Stat., 2d ed., 610.
Davison *vs.* Gill, 1 East., 64.
Rex *vs.* Loxdale, 1 Bur., 445.
State *vs.* Foster, 61 Mo., 549.

And the court is also referred in interpreting the legislative intent where negative words are used to the following decisons:

Liverpool Burrough Bank *vs.* Turner, 2 DeG., F. & J., 502.
Howard *vs.* Bodington, 2 P. D., 203.
Bladen *vs.* Phila., 10 Smith (Pa.), 464.
Hurford *vs.* Omaha, 4 Neb., 336.
State *vs.* Smith, 67 Me., 328.
Rex *vs.* Newcomb, 4 T. R., 368.
Bowman *vs.* Blyth, 7 E. & B., 47.
People *vs.* Allen, 6 Wend., 486.

In the Anarchist cases, 143 U. S., 443, what the court did was in strict conformity with the Criminal Code of Illinois relating to prosecutions by indictment for capital cases, which provides that "if the judgment is affirmed the Supreme Court shall by order fix the time when the original sentence of death shall be executed, a copy of which order shall be sufficient authority to the sheriff for the execution of the prisoner at the time therein specified," and "that if the judgment is affirmed, the Supreme Court shall direct the court in which the original sentence was rendered to carry the same into effect, and shall give judgment against the plaintiff in error for costs, and execution may issue therefor from the Supreme Court.

Rev. Stat. Ills., C. 38, Crim. Code, Sects. 459, 465., Div. XV.

It is the absence of a like statutory provision authorizing the Supreme Court of the District of Columbia, in case of appeals in capital cases on affirmance of judgment, to fix the time when the original sentence of death shall be executed, that causes the trouble in the present case. The legislature of Illinois, appreciating the contingencies that might arise on appeals in capital cases, saw fit to pass an act expressly empowering the court to meet the situation and appoint a day other than that originally fixed when the execution could be carried into effect.

Referring again to section 845, R. S. D. C., above quoted, it seems plain that time is made a part of the judgment, and by section 1093 place is also. If it is not the statutory limitation as to time becomes nugatory. It must be conceded that in most States time and place are made parts of the judgment, and we fail to find any statute using plainer or more explicit terms to effect their union with the judgment or sentence of the court than the one under discussion. It says *in all cases* when the judgment shall be death, &c., the court *shall* &c. postpone the final execution thereof (i. e. of the judgment) to a reasonable time beyond the next term of the court, *not* exceeding in *any case* thirty days after the end of such term. The power of the court is circumscribed by express terms. The judgment must be carried into effect within the period limited, else the power of the court to enforce it is forever gone. The exigencies arising in the present case are attributable to a condition of things which Congress failed to foresee. Prior to the act of February 6, 1889, in the ordinary course of business, the period prescribed by section 845 would, in all cases, permit ample time for the hearing of criminal appeals by the court in general term, and as a matter of practice (especially capital cases) they were given priority. The necessity for additional legislation to meet possible exigencies therefore did not present itself. There was no way of getting a criminal case beyond the court in general

term. After the passage of the act of February 6, 1889, it was attempted to carry the case of appellant before the Supreme Court of the United States, and the court in general term under section 1040, R. S. U. S., postponed the time of execution. The decision of this court in dismissing the writ of error for want of jurisdiction makes it plain that the court in general term had no such power, and the order of postponement was erroneously made.

Section 845 of the Revised Statutes of the District of Columbia, was enacted in 1838, and since that time has been uniformly and invariably interpreted to control the power of the trial court in postponing final execution in all cases of homicide and other felonies. In *no instance* has any judge of the court ever departed from this well recognized and established practice, and counsel confidently assert that no case of homicide or felony in the District courts can be found in which this usage or practice has been departed from. In the case of United States *vs.* Guiteau, 1 Mackey, 508 and 551, the general term treated time as a necessary and essential part of the sentence of death. No other inference can be gathered from the language of Mr. Justice James, who delivered the opinion of the court. But if any doubt ever existed as to the interpretation of this act by the general term of the District of Columbia, it was removed when the said general term postponed the sentence of death in the appellant's case under and by virtue of section 1040 of the Revised Statutes of the United States. The general term thereby admitted that the power to postpone the final execution under section 845 had been exhausted, and that there was no power in the court to order a further postponement, unless given by section 1040 of the Revised Statutes of the United States.

It is therefore respectfully submitted that the court in General Term had no power or jurisdiction to postpone the day of execution of sentence, and that the power of the special term was exhausted after the expiration of the time prescribed by section 845 of the Revised Statutes of the District of Columbia, that appellant is held by the warden of the District jail without due process of law, and is entitled to be discharged.

CHARLES MAURICE SMITH,
JOSEPH SHILLNGTON,
Counsel for the Appellant.

APPENDIX.

Time and place made part of sentence by statute in following States:

New York, Crim. Code, Secs. 502 and 506.
Mass., R. S., Ch. 215, Secs. 32 and 37.
Vt., R. S., Secs. 1731 and 1733.
Conn., R. S., Sec. 1639.
Md., Code, Arts. 27 and 87, Secs. 301 and 294.
Va., Code, Secs. 4061 and 4063.
W. Va., Code (same as Va.)
N. H., R. S., Ch. 255, Secs. 6 and 7.
Ill., R. S., Ch. 38, Secs. 439 and 440.
Ind., R. S., Secs. 1872 and 1875.
Minn., R. S., Sec. 6882.
Texas, R. S.
Florida, R. S.
Col., R. S.
Cal., R. S.
Ky., R. S. Sec. 22.
Ga., R. S.
Ala., Code, Secs. 4665 and 4667.
Ark., R. S., Secs. 2316 and 2330.
Iowa, R. S., Secs. 5133 and 5140.
Kansas, R. S., Secs. 5327 and 5329.
Miss., R. S., Secs. 3085 and 3092.
Mo., R. S., Secs. 4245 and 4258.
Ohio, R. S., Sec. 7338.
Tenn., R. S., Secs. 6120 and 6121.

Postponement of sentence by governor:

New York Crim. Code, Sec. 692.
Mass. (by advice of counsel), R. S., Ch. 215, Sec. 33.
Vt. (by legislature), R. S., Sec. 1732.
Conn. (in board of governor and 5 others), R. S., Sec. 3269.

Del., R. S., Ch. 27, Sec. 5.
Penn., R. S., ———.
Md., Code, Art. 27, Sec. 294.
Va., Const., Art. 4, Sec. 5.
N. H., R. S., Ch. 20, Sec. 5.
Ind., R. S., Sec. 1874.
Fla., R. S.
Colo., R. S.
Cal., R. S.
Ky., Const., Art. 3, Sec. 10.
Ga., Const., Art. 5.
Ala., Const., Art. 5, Sec. 12.
Ark., Const., Art. 6, Sec. 18.
La., Const., Art. 66.
Iowa, R. S., Sec. 5136.
Kansas, R. S., Sec. 3969.
Neb., R. S., Sec. 6197.
Nev., R. S., Sec. 4246.
Ohio, R. S., Sec. 92.
Tenn., R. S., Sec. 6093.
S. C., Const., Art. 3, Sec. 11.

Warrant issued by the court:
New York, Crim. Code, Sec. 501.
Del., R. S., Ch. 32, Sec. 11.
Va., Code, Sec. 4062.
W. Va., Code.
Ind., R. S., Sec. 1873.
Cal.
Ga., R. S.
Iowa, R. S., Sec. 5135.
Miss., R. S., Sec. 3085.
Mo., R. S., Sec. 4245.
Ohio, R. S., Sec. 7339.

Warrant issued by the governor:

New Jersey, R. S., Sec. 1846.
Penn., R. S.
Md., Code, Art. 41, Sec. 5.
Minn., R. S., Sec. 6881.
Fla., R. S.
Ark., R. S., Sec. 2332.
La., R. S., Sec. 1004.
Kansas, R. S., Sec. 5328.
Neb., R. S., Sec. 6194.

Postponement of sentence by court:

Ind., R. S., Sec. 1874.
Mo., R. S., Sec. 4246.
Tenn., R. S., Sec. 6098.

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In the Supreme Court of the United States.

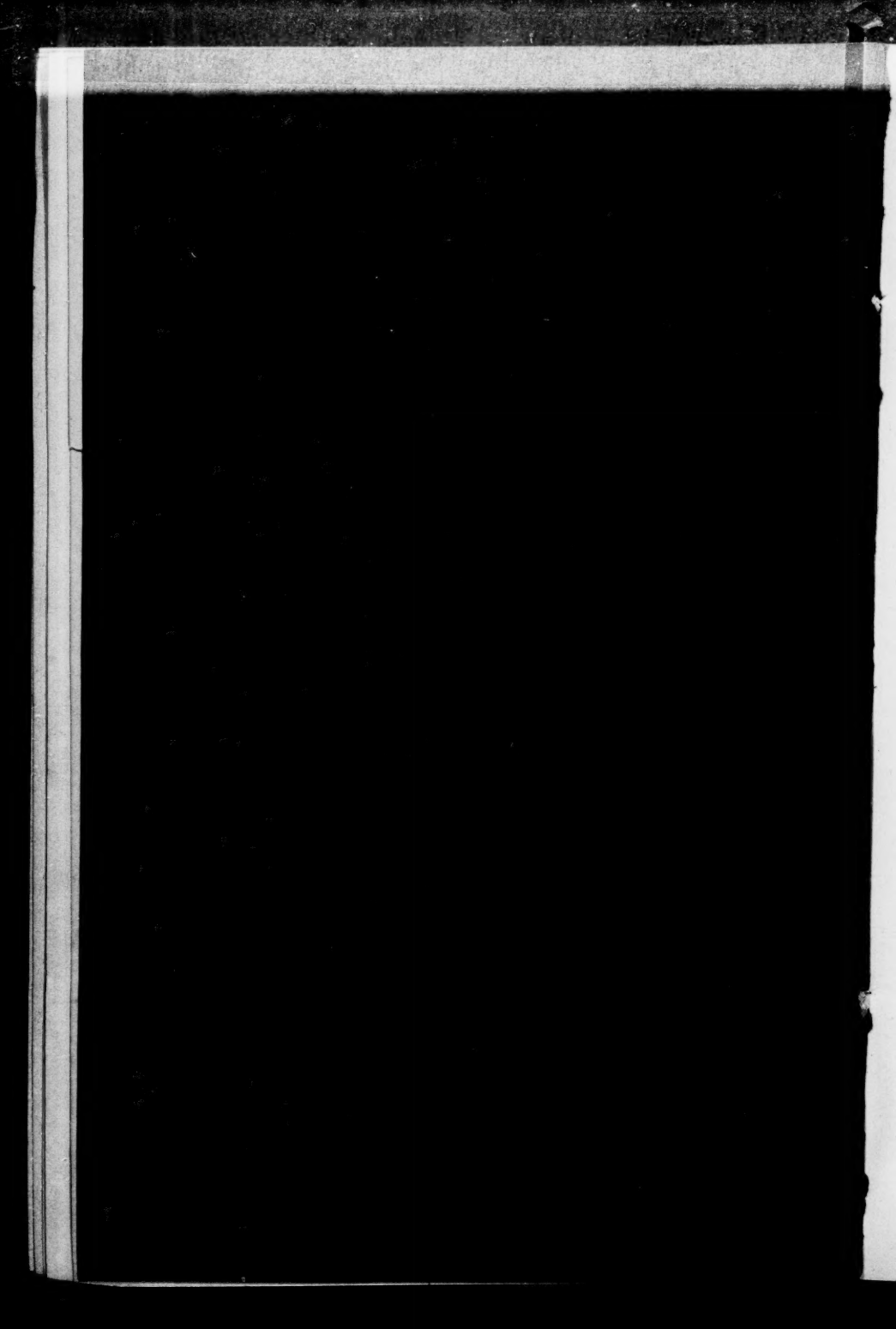
OCTOBER TERM, 1892.

TERM NO. 1105.

WILLIAM DOUGLASS CROSS, APPELLANT,
vs.
JEROME B. BURKE, WARDEN OF THE jail for the District of Columbia.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.



In the Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM NO. 1105.

WILLIAM DOUGLASS CROSS, APPELLANT,
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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

This case is before the court upon appeal from a decision of the Supreme Court of the District of Columbia sitting in general term, denying to the appellant a writ of habeas corpus.

The appellant was indicted for murder at a criminal term of the Supreme Court of the District of Columbia,

and, in March, 1890, after trial, verdict, motion for new trial, etc., sentenced to death. This sentence, on appeal to a general term of said court, was reversed and a new trial ordered. Such new trial was had at a special criminal term of the said Supreme Court in June, 1891, and resulted in a second conviction and sentence to death. This sentence and conviction were, on June 12, 1892, on appeal to a general term of the Supreme Court of the District, affirmed.

From this last decision a writ of error to the Supreme Court of the United States was allowed. On the day of the allowance of such writ of error, viz, on January 21, 1892, the execution of the death sentence, which had been fixed, by order of the Supreme Court of the District, at the special criminal term, when Cross was convicted, for January 22, 1892, was, by an order entered by the Supreme Court of the District in general term, postponed until the 10th of June, 1892. The writ of error to this Court was, on May 16, 1892, dismissed for want of jurisdiction (*Cross* vs. *United States*, 145 U. S., 571).

Twelve days after this dismissal of his writ of error, viz, on May 28, 1892, Cross petitioned the Supreme Court of the District for a writ of habeas corpus, taking the position that the sentence under which he was confined was inoperative and void, because it had not been executed on the day specified in the order of the Supreme Court of the District in special term, but had been postponed illegally, because the Supreme Court in general term had no jurisdiction to enter such order. The petition for the writ was heard in the first instance by the Supreme Court of the District in general term. The writ was refused on

June 4, 1892, and the cause remanded to the special term for further proceedings. On June 6, 1892, the court in special term ordered the warden of the jail in which Cross was confined to execute the sentence of death on June 16, 1892, the day to which the general term had extended it. But on June 8, 1892, the court below, in general term, allowed this appeal, and the court in *special* term entered an order postponing the execution of the death sentence to November 11, 1892.

I.

THIS COURT HAS NO JURISDICTION OF THIS APPEAL AND THE SAME SHOULD BE DISMISSED.

In considering the question whether this Court has jurisdiction to entertain this appeal, it is first necessary to determine whether the proceeding below was a *criminal* or a *civil* proceeding.

The foregoing statement of facts shows that the proceeding was a petition for a writ of *habeas corpus* by one who had been tried, convicted, and sentenced to be hanged, on an indictment for murder. The prisoner claims to be released from confinement on the ground that the sentence under which he is kept in jail has become inoperative and void, because it was not executed on the day fixed by the court before which he was tried, by reason of a postponement to another day by a court having no jurisdiction to make or order such postponement. Because of this alleged want of jurisdiction, it is claimed that the postponement was illegal; that the original day fixed for executing the sentence having passed, the sentence can not now be executed at all, and is consequently void.

Upon the authority of the following cases, and the principles there laid down, it is insisted that this is a civil proceeding.

In *ex parte Tom Tong* (108 U. S., 556, 1883), which originated as a petition for a habeas corpus addressed to the circuit court of the United States for the district of California, the petitioner was in the custody of the chief of police of the city and county of San Francisco, California. He was charged with establishing, maintaining, and carrying on the business of a public laundry, in violation of an order or ordinance of the board of supervisors of said city and county regulating the licensing, etc., of public laundries. It was claimed that the "ordinance for the violation of which the petitioner was held was in contravention of the Constitution of the United States, and of a treaty between the United States and the Emperor of China." No final decision was reached by the circuit court, but certain questions were certified to this Court.

Chief Justice Waite delivered the opinion of the Court. After stating that the procedure adopted by the judges below, namely, that of certifying the questions on which they differed without having entered any final judgment in the whole case, could give this Court jurisdiction only in case the proceeding below was a criminal proceeding, he took up the question whether the petition for a habeas corpus was a civil or criminal proceeding. He came to the conclusion that it was a civil proceeding. At page 559 the Court says:

> The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws

> for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process. If he fails to establish his right to his liberty he may be detained for trial for the offense; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the Government to punish him for his crime.

(See *in re Wo Lee*, 26 Fed. R., 471, 473, where the effect of the decision in *ex parte Tom Tong* is stated by Judge Sawyer.)

In ex parte Clodomiro Cota (110 U. S., 385, 1884) this Court approved and followed *Ex parte Tom Tong*. The court there stated its decision in the previous case thus:

> This court could not take jurisdiction of a certificate of division in opinion between the judges of a circuit court in proceedings under a writ of habeas corpus until final judgment had been rendered in accordance with the opinion of the presiding justice or judge.

In Kurtz v. *Moffitt et al.* (115 U. S., 487, 1885) Kurtz petitioned a court of the State of California for a writ of

habeas corpus addressed to the defendants, Moffitt and Fields, who, the petition alleged, had unlawfully arrested him as a deserter from the army of the United States. Moffitt and Fields filed a petition for a removal into the circuit court of the United States. The question before the Supreme Court was whether the case was removable under the act of 1875.

Mr. Justice Gray, speaking for the court, said:

> In order to justify the removal of a case from a State court into the circuit court under this act, * * * it must be "*a suit of a civil nature at law or in equity.*" * * *
>
> A writ of habeas corpus, sued out by one arrested for crime, is a civil suit or proceeding brought by him to assert the civil right of personal liberty against those who are holding him in custody as a criminal. (*Ex parte Tom Tong* 108 U. S., 556.)

In *Farnsworth* v. *Montana* (129 U. S., 104, 113), this court cites *ex parte Tom Tong* (108 U. S., 556) as deciding that a writ of habeas corpus is a "civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution."

On the authority of the foregoing cases it seems clear that the petition for the writ of habeas corpus in this case was a civil proceeding. The difference in point of fact between the case at bar and the cases relied on, namely, that in this case the petitioner has been convicted and is imprisoned under a sentence in a criminal case, while in the cases cited the petitioners were in prison awaiting trial on a criminal charge, probably furnishes no basis for a discrimination in point of principle.

The judicial proceedings in this case, as in those, is "*no to inquire into the criminal act*," nor is it to inquire into the proceedings under which the petitioner was found guilty of a criminal act; it is not to review the action of the trial court, but it is to inquire "into the right to liberty," notwithstanding the criminal act and the conviction therefor.

Authority, other than that already furnished, is found in the practice of this court in issuing writs of habeas corpus upon original application, which seems to support the view that a petition for a writ of habeas corpus, even when brought by a convicted criminal imprisoned under sentence, is a civil proceeding and not a criminal one, where the object of the petition is not to secure a review of the proceedings under which conviction was had, but is merely to assert a right to liberty, on the ground that, notwithstanding the conviction, there is no authority to hold the petitioner under the sentence.

Up to 1889 there was no way of bringing a criminal case from a circuit or district court of the United States to this court for review except on a certificate of division in opinion among the judges below.

(See *United States* vs. *Sanges*, 144 U. S., 310, 319, 1891, for an elaborate history of the appellate jurisdiction of this court in criminal cases.)

Yet, in spite of this absence of jurisdiction to review by appeal or writ of error, a criminal case in the circuit or district courts, it was the constant practice of the Supreme Court to grant writs of habeas corpus on the original application of prisoners convicted and sentenced in the lower courts of the United States. To the objection

that this was exercising original jurisdiction in a class of cases in which jurisdiction was not given by the Constitution, it was replied that the jurisdiction, though original in ferm, was appellate in substance.

To meet the further objection that the issuing of writs of habeas corpus in such cases was doing indirectly what the court could not do directly, namely, exercise an appellate jurisdiction in a criminal case, the court confined its inquiry on such writs of habeas corpus to a consideration of the jurisdiction of the court below, and refused to discharge a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeded the jurisdiction of the court, or there was no authority to hold him under sentence.

(See *Ex parte Wilson*, 114 U. S., 420–421, and cases cited.)

Does not this practice of issuing writs of habeas corpus in favor of convicted criminals and discharging such criminals on such writs, where it appeared that the court below was without jurisdiction, notwithstanding the want of jurisdiction in criminal cases by appeal or writ of error, rest on the theory that the proceeding was *in substance* civil as well as appellate? Therefore, is it not strong authority to show that the proceeding below in the case at bar was civil and not criminal?

Assuming that this is a civil case and not a criminal one, the question whether this appeal lies depends entirely on the statutes regulating appeals in civil cases to this court from the Supreme Court of the District of Columbia. What then are the statutes upon that subject?

The particular provision which concerns us here is that contained in the act of March 3, 1885 (23 Stats., 443), "An act regulating appeals from the Supreme Court of the District of Columbia and the supreme courts of the several Territories." This act provides in section 1—

> That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of $5,000.

The second section makes certain exceptions to the rule established in the first.

As we have seen, the present appeal is from a final judgment in a suit at law in the Supreme Court of the District. By the express words of the statute, it does not lie, unless "the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars."

The matter in dispute in this case is the right of the petitioner to his liberty. Has such a right any money value?

In *Kurtz* v. *Moffitt* (115 U. S., 487, 1885) the question before the Court was, whether a petition for a habeas corpus was removable, under the act of 1875 (18 Stats., 470), from a State to a Federal court. That act provided that there could be no removal, except in "a suit of a civil nature, at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars."

It was decided that a habeas corpus proceeding was not removable because the matter in dispute had no money value.

Mr. Justice Gray reviewed the authorities very carefully, drawing therefrom this conclusion, p. 498.

> From this review of the statutes and decisions the conclusion is inevitable that a jurisdiction, conferred by Congress upon any court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money; and, therefore, that writs of habeas corpus are not removable from a State court into a circuit court of the United States under the act of March 3, 1875 (chap. 137, sec. 2).

De Krafft v. *Barney* (2 Black, 704, 1862) is cited by Mr. Justice Gray in the opinion referred to. As stated by the court, it was as follows: An appeal was taken from a decree of the circuit court of the District of Columbia, awarding the custody of a child to the father as against the divorced mother. No appeal was allowable from the circuit court of the District unless the value of the matter in dispute was $1,000 or upwards. The appeal was dismissed "for want of jurisdiction," Chief Justice Taney saying that the case was not distinguishable from *Barry* v. *Mercein* (5 How. 103), and in that case it was held—

> That in order to give this court jurisdiction under the twenty-second section of the judiciary act of 1789 the matter in dispute must be money, or some right, the value of which could be calculated and ascertained in money.

In *Snow* vs. *The United States* (118 U. S., 346, 354), Mr. Justice Blatchford, pronouncing the opinion of the court, says:

> As to the deprivation of liberty, whether as a punishment for crime or otherwise, it is settled by a long course of decisions, cited and commented on in *Kurtz* vs. *Moffitt*, *ubi supra*, that no test of money value can be applied to it to confer jurisdiction.

In *Farnsworth* vs. *Montana* (129 U. S., 104, 111), both *Snow* vs. *The United States* and *Kurtz* vs. *Moffitt* are cited with approval.

It necessarily follows from the foregoing propositions, namely, that the proceeding below was a civil suit at law and that the matter in dispute had no money value, that this appeal must be dismissed, unless it can be established that the act of 1885, fixing the jurisdictional amount in cases of appeals from the Supreme Court of the District of Columbia at $5,000, does not apply to appeals from judgments denying the writ of habeas corpus.

The history of the appellate jurisdiction of the Supreme Court, by way of writ of error, or appeal, from circuit courts, in proceedings upon habeas corpus, is as follows:

From the beginning of the Government up to 1842 no appeal upon habeas corpus could be brought to the Supreme Court, because no money was involved. But the Court did exercise an appellate jurisdiction over cases of habeas corpus in an indirect manner, viz, by itself issuing writs of habeas corpus and *certiorari* to the circuit courts.

In 1842 direct appeals from the circuit court were allowed in a small class of cases upon habeas corpus. This act did not disturb the procedure outlined above.

In 1867 an act was passed which was construed to allow a direct appeal in *all* cases of habeas corpus.

In 1868 the act of 1867 was repealed.

The effect of the act of 1868 was to leave the appellate jurisdiction of the Supreme Court upon habeas corpus in the shape in which it stood before the act of 1867.

The authority for the foregoing will be found in *Ex parte McCardle* (6 Wall., 318), *Ex parte McCardle* (7 Wall., 506).

March 3, 1885, an act was passed allowing direct appeals from the *circuit courts* in all cases of habeas corpus.

Under the judiciary act of 1891 no appeal lies to the Supreme Court, either from the circuit courts or the circuit courts of appeal, in a case of habeas corpus *similar to this one.* (*Lau Ow Bew* vs. *The United States*, 144 U. S., at p. 58.)

But the Supreme Court can, under the act of 1891, by *certiorari*, require *such a suit as this* to be certified to it from the circuit court of appeal.

Thus we have seen in the foregoing history that Congress has, by special legislation applicable to cases of habeas corpus, taken such cases out of the general legislative rule requiring a certain amount of money to be involved before a case can be taken to the highest tribunal, *so far as circuit courts are concerned.*

How far does this legislation, in regard to appeals from circuit courts upon writs of habeas corpus, apply to appeals in similar cases from the Supreme Court of the District of Columbia?

Section 846 of the Revised Statutes of the District of Columbia provides:

> Any final judgment, order, or decree, of the supreme court of the District may be reëxamined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner *as provided by law* in reference to the final judgments, orders, and decrees of the circuit courts of the United States.

In the words of Mr. Justice Miller, in *Wales* vs. *Whitney* (114 U. S., 564, 566), this section—

> Makes the jurisdiction of this court over judgments and decrees of the circuit courts of the United States the measure of its jurisdiction (except as regards the sum in controversy) over judgments and decrees of the Supreme Court of the District in similar cases.

This section was originally enacted March 3, 1863, and thence inserted in the Revised Statutes, which were promulgated June 22, 1874.

In *In re Heath* (144 U. S., 92) (1892) it was decided that this section, in thus adopting the acts governing appeals from the circuit courts, did not likewise adopt changes in those acts.

Thus, under that decision, the effect of this section, whether we regard it as of the date 1863 or 1874, simply adopted, so far as it applies to cases of habeas corpus, the act of 1842, that being the only act then in force allowing appeals in such cases from the circuit courts. That act allows appeals only in a small class of cases. The case at bar is not one of them.

As to the proceeding by indirect appeal, *i. e.*, by original application to the Supreme Court for habeas corpus and

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As to the proceeding by indirect appeal, *i. e.*, by original application to the Supreme Court for habeas corpus and

certiorari, it is not necessary here to inquire whether that could be resorted to, for this case comes up on *direct* appeal.

The necessary conclusion, if the foregoing positions are authorized, is that this appeal must be dismissed for want of jurisdiction.

It may be said that *In re Heath* (144 U. S., 92) does not decide that section 846 of the Revised Statutes of the District of Columbia does not adopt changes in the law governing appeals in habeas corpus; that it was previously decided in *Wales* v. *Whitney* (114 U. S., 564) that changes in the law governing appeals in cases of habeas corpus from the circuit courts do become a part of that section; also that in *Callan* v. *Wilson* (127 U. S., 540) this court took jurisdiction of an appeal from the Supreme Court of the District in a habeas corpus case.

To this position we reply,

Assuming the position to be correct, then according to the latest change in the statutes governing appeals from the circuit courts in cases of habeas corpus, no appeal can be taken in such a case as the one at bar to the Supreme Court from a circuit court, but only to a circuit court of appeals, and the decision of that court is final unless the Supreme Court issues a *certiorari*. (*Lau Ow Bew* vs. *The United States*, 144 U. S., at 58.)

But the position is not correct.

Wales vs. *Whitney* (114 U. S., 564), was mainly relied on by counsel for the petitioner in *In re Heath*, 144 U. S., 92.

If the latter case does not overrule *Wales* vs. *Whitney*, the court shows a disposition to rest it on some special ground (see 144 U. S., pp. 95, 96). It is submitted that

the direct appeal in that case must be justified, if at all, not as authorized by special statutory provisions relating to appeals in writs of habeas corpus, but as authorized by the general statute governing appeals in civil cases where the matter in dispute was of the value of $5,000. (Act of March 3, 1885, *supra*.) The case was, it is true, a case of habeas corpus. But it was a civil suit; and, besides, the matter in dispute had, perhaps, a money value. It is not true that in every case of a writ of habeas corpus no question valuable in money is involved. In some cases the question involved has a money value. It is enough to say that the question of jurisdiction was not seriously disputed so far as can be judged from the report of the case. In neither *Wales* vs. *Whitney* nor *Callan* vs. *Wilson* was the question of jurisdiction mooted. (*Lee* vs. *Lee*, 8 Pet., 44; *Smith* vs. *Whitney*, 116 U. S., at 173.)

Again, even granting that the statement reported in *Wales* vs. *Whitney*, that the act of 1885, in restoring jurisdiction over direct appeals from circuit courts in *all* cases of habeas corpus, also, in conjunction with section 846, Revised Statutes of the District of Columbia, restored jurisdiction over appeals in all cases of habeas corpus from the Supreme Court of the District, and that the act of 1891, though it affects appeals in habeas corpus from the circuit courts, does not affect such appeals from the Supreme Court of the District; still it is contended that the act of March 3, 1885, fixing $5,000 as the amount necessary to be involved before a suit could be appealed from the Supreme Court of the District of Columbia, applies to cases of habeas corpus; that such cases can not, because of that act, be appealed unless $5,000 is involved. The act pro-

vides that "*no appeal* or writ of error shall hereafter be allowed * * * in *any* suit at law or equity" (23 Stat., 443), etc., unless $5,000 is involved. This act is certainly broad enough to embrace habeas corpus cases. It is to be noted that this act was passed on the same day that the act amending section 764, R. S., was enacted, which in turn only allows appeals in habeas corpus cases from circuit courts (23 Stat., 437). It is suggested that had Congress intended to make habeas corpus cases in the District appealable without regard to value it would under the circumstances have made an exception.

To summarize the argument in favor of dismissing this appeal:

1. The suit is a civil suit at law.
2. The matter in dispute therein has no money value.

(*a*) From these two positions the conclusion follows that no appeal lies. (23 Stat., 443).

(*b*) This conclusion can not be avoided by an attempt to bring the appeal within the statutes specially applicable to writs of habeas corpus. Such an attempt can not be successful, because,

(1) Section 846 of the Revised Statutes of the District of Columbia adopts only the act of 1842 in regard to appeals from the circuit courts in habeas corpus.

(2) This case is not within that act.

(3) But if section 846 does adopt changes in statutes, or subsequently enacted statutes, governing appeals in cases of habeas corpus from the circuit courts, and thus adopts the act of 1885, restoring full, direct,

appellate power over cases of habeas corpus, the appellant gains nothing; for on the principle which incorporates the act of 1885 in section 846, the act of 1891 must be so incorporated, and under that act no direct appeal would lie in this case from a circuit court to the Supreme Court.

(4) The act of 1885 specifying the amount necessary to give the Supreme Court jurisdiction applies to *all* appeals or writs of error. It takes habeas corpus cases out of the special legislation applicable to such cases when appealed from circuit courts.

It is therefore respectfully submitted that the appeal should be dismissed.

II.

THE ORDERS EXTENDING THE TIME FOR THE EXECUTION OF THE SENTENCE WERE PROPERLY ENTERED BY COMPETENT AUTHORITY AND THE SENTENCE OF DEATH MUST BE EXECUTED.

On July 30, 1891, the Supreme Court of the District, at a *special* criminal term, sentenced Cross to be executed on January 22, 1892.

The Supreme Court of the District, in *general* term, on January 12, 1892, affirmed, on appeal, this sentence of the *special* term.

On January 21, 1892, the day before the day fixed at special term for the execution of Cross, a writ of error from the Supreme Court of the United States to the Supreme Court of the District, in *general* term, was allowed.

On the same day the Supreme Court, in *general term*, entered an order postponing the day for executing the sentence of death from January 22 to June 10, 1892, "between the same hours specified in the said judgment of the said special term." On June 8 an order was entered in special term fixing the date of execution on November 11, 1892.

The writ of error on account of which this order of postponement was entered having been dismissed for want of jurisdiction, counsel for Cross now contend that the prisoner is entitled to his liberty; that he is held under a sentence now void; that the sentence became void by reason of the postponement of the date of its execution by order of the *general term*, because that court had no jurisdiction to make the order; and that the sentence not having been executed on the day specified in the order of the special criminal term, and there having been no legal postponement of the execution, it can not now be executed at all.

Two questions grow out of this contention:

First. Was there a legal postponement?

Second. If there was not, does it follow that the sentence is void?

In regard to the postponement of sentences in criminal cases, section 845 of the Revised Statutes of the District of Columbia provides:

> To enable any person convicted by the judgment of the court to apply for a writ of error in all cases when the judgment shall be death or confinement in the penitentiary, the court shall, on application of the party accused, postpone the final execution thereof to

a reasonable time beyond the next term of the court, not exceeding in any case thirty days after the end of such term.

Section 1040, R. S., provides:

> Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the Supreme Court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term until the mandate of the Supreme Court in the case is received and entered upon the records of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment shall appoint a day for the execution thereof; and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct.

Had the postponement of the execution of the sentence of death been ordered at the criminal term, or by the criminal term, or by the Supreme Court in criminal term, whatever be the correct expression, it probably would not be contended, in view of these statutes, that the postponement was illegal.

The grounds on which, so far as one can anticipate, it is contended that the postponement was illegal seem to be two.

(1) The order of postponement was entered by the court in general term, whereas it should have been entered by the court in special term.

(2) Even if the order was entered by the proper tribunal, yet there was no power in any court to order a postponement, because a writ of error such as was taken here, viz, from the Supreme Court of the United States

to the Supreme Court of the District, does not lie. The statute gives a power of postponement only where a writ of error lies.

First. It was proper for the Supreme Court in general term to order the postponement.

The Supreme Court of the District of Columbia in special term, and the Supreme Court in general term, are or constitute but one court, viz, the Supreme Court of the District of Columbia.

Section 753, Revised Statutes of the District of Columbia, provides:

> The several general terms and special terms of the circuit courts, district courts, and criminal courts authorized by law and declared to be, severally, terms of the supreme court of the District of Columbia; and the judgments, decrees, sentences, orders, proceedings and acts of the general terms, special terms, circuit courts, district courts, and criminal courts rendered, made, or had, are and shall be deemed judgments, decrees, sentences, orders, proceedings, and acts of the supreme court; but nothing contained in this section shall affect the right of appeal as provided by law.

Section 759 provides:

> The special term held as the criminal court shall be holden on the first Monday in March, the third Monday in June, and the first Monday in December in each year.

Section 763 provides:

> Any one of the justices [of the Supreme Court of the District] may hold a criminal court for the trial of all crimes and offenses arising within the District.

The petitioner was convicted at the June special criminal term. He was sentenced at that term; but, by the express words of section 753, that sentence was a sentence of the Supreme Court. The execution was postponed by order of the Supreme Court at general term. That order was an order of the Supreme Court. The same court entered the sentence. Under the statute authorizing postponements a court can clearly postpone the execution of *its own* sentences.

There certainly can be nothing in the point that the order of postponement was made by a court other than the one that entered the sentence. Both the sentence and the postponement of the execution thereof were acts of one and the same court, namely, the Supreme Court of the District of Columbia.

Direct authority in support of this position will be found in *Ex parte Bradley*, 7 Wall., 364 (1868), and *Bradley v. Fisher*, 13 Wall., 335 (1871).

In the first case it was decided that the criminal court of the District was a district court, separate from the supreme court. This decision was made before the passage of the act of June 21, 1870, incorporated into the Revised Statutes of the District as section 753, and quoted in full above.

In *Bradley v. Fisher* it is stated that the effect of this act was to destroy the independent character of the criminal court.

(See Mackey's Practice and Procedure, etc., p. 267.)

Richards v. Mackall, (113 U. S., 539 1885) was an appeal from a decree of the Supreme Court of the District

of Columbia at a general term. The appeal was allowed by the Supreme Court at *special term*. The Court, by Mr. Chief Justice Waite, say:

> This, we think, may be done. An appeal in a proper case is a matter of right. The decree appealed from was the decree of the Supreme Court, and the court, while sitting in special term, was still the Supreme Court, and as such capable of allowing an appeal to this court from one of its final decrees, though rendered at general term. As the general term had closed it was quite proper to apply to the court sitting in special term for the allowance of the appeal.

In *Mackall v. Richards* (116 U. S., 45, 47), the court say:

> The decree upon the mandate [of the Supreme Court of the United States], although rendered at general term, was still the decree of the Supreme Court of the District.

Plainly, under the statute allowing postponements, this postponement was legal; it was ordered by a court having power to make the order.

A paragraph in the opinion of Mr. Chief Justice Fuller, in *Cross* v. *United States* (145 U. S., 571, 577), perhaps gives some countenance to the idea that the Supreme Court in general term and the Supreme Court in special criminal term are two separate courts. It is there said:

> It is to be observed that the writ runs to the judgment of the general term; yet if this man goes to his death, it is not by force of the judgment of the general term, but of the sentence of the criminal term.

It is suggested that the learned Chief Justice evidently used these phrases as substitutes for the longer and perhaps more accurate ones, viz, "Judgment of the Supreme Court at gen al term" and "sentence of the Supreme Court at criminal term." Compare the language of the Chief Justice used on pp. 572, 573, especially 573, last paragraph.

In *Richards* v. *Mackall* (113 U. S., 539), Chief Justice Waite says:

> The Supreme Court of the District of Columbia consists of one Chief Justice and five Associate Justices. (Rev. Stats. D. C., § 750, 20 Stat. 320, ch. 99, § 1.) The law provides for both special and general terms of the court and for an appeal from the special to the general term, but the judgments and decrees, when rendered are, whether they be at general or special term the judgments and decrees of the Supreme Court. (Rev. Stats. D. C., secs. 753, 772.) A general term is held by three justices, two, however, constituting a quorum, and a special term by one. (Rev. Stats. D. C., secs. 754, 757, 20 Stats. 320, ch. 99, § 2.)

If the Supreme Court, at general term, could, under the statute, postpone the execution of the sentence, plainly its order of postponement is not rendered invalid by the fact that the writ of error was refused or dismissed for want of jurisdiction.

The power to postpone execution of a sentence is given, by the express words of the statute, "to enable any person, &c., *to apply for a writ of error.*"

It nowhere appears that he must be successful or that the postponement is limited to the time necessary to *apply*

for the writ. Such a contention leads to the absurd conclusion that he might be executed while the writ was pending and undetermined.

III.

THE TIME WHEN A SENTENCE SHALL BE CARRIED INTO EXECUTION IS IN LAW NO PART OF THE SENTENCE.

Even if the time of executing the sentence was not legally postponed, and even if the Supreme Court in general term had no power to enter the order of postponement, it does not follow that the sentence itself is void and that the convict is entitled to his liberty.

The time of the execution is no part of the sentence unless made so by statute. (1 Bishop's Criminal Procedure, 3 ed., § 1310.)

The author says:

> The substance of every sentence is the punishment, not the time of its infliction. Therefore, the day when an imprisonment is to begin or end need not be, and by the better practice is not, inserted in the sentence, though it may be otherwise under the command of a statute.

Again, in section 1311:

> Under the common-law practice a sentence to death, or any other corporal infliction, is generally silent as to the *time*, which is left to the discretion of the officer, or is appointed by a subsequent rule of the court. It is so even of the *place*. In some of our States the day of inflicting a capital punishment is determined by the governor; then, of course, it can not appear in the sentence.

In *Costley* v. *Commonwealth* (118 Mass., 34, 35) GRAY, *C. J.*, said:

> The fixing of the time and place of execution is no part of the judgment or sentence of death, and may be regulated by statute, so as to be done by order of the court contemporaneously with the sentence, or by the Governor and Council, or even, as by the common law of England, left to the discretion of the sheriff.

In *Cathcart* v. *Commonwealth* (37 Pa., St. 115) an assignment of error raised the question whether a sentence of death which did not appoint a day of execution was a proper sentence.

The court said:

> Our act of assembly of 31st of May, 1718, * * * enacted that whenever convictions should happen it should be lawful to give judgment "according to the manner, form, and direction of the laws of that part of Great Britain called England, in the like cases." This provision was, indeed, hardly necessary, for, without it, our courts, being common-law courts, would have had that power unless restrained by statute. The manner and form of giving judgment in England in 1718 in case of conviction for murder, was precisely that which the Court of Oyer and Terminer adopted in this case. The convict was sentenced to death by hanging, but the sentence did not fix the time and place of execution. That such was the mode and form of pronouncing judgment in capital felonies appears from all the books.

See *Clifford* v. *The State* (30 Md., 575).

In *Schwab* v. *Berggren* (143 U. S., 442, 451) this court said:

> It is well settled that the time and place of execution are not, strictly, part of the judgment or sentence,

unless made so by statute. Citing: *Holden* v. *Minnesota* (137 U. S., 483), and authorities there cited, 1 Chitty's Criminal Law (780, 787), *Costley* v. *Commonwealth* (118 Mass., 32).

In *Holden* v. *Minnesota* (137 U. S., 495) the judgment below left the time of execution to be fixed by the governor, there being a State statute vesting in the governor power to name the time and place of executing capital sentence. It was objected that this was not due process of law. This court said:

> The court sentenced the convict to the punishment prescribed for the crime of murder in the first degree, leaving the precise day for inflicting the punishment to be determined by the governor. The order designating the day of execution is, strictly speaking, no part of the judgment unless made so by statute. And the power conferred upon the governor to fix the time of infliction is no more arbitrary in its nature than the same power would be if conferred upon the court. Whether conferred upon the governor or court, it is arbitrary in no other sense than every power is arbitrary that depends upon the discretion of the tribunal or the person authorized to exercise it. It may be, also, observed that at common law the sentence of death was generally silent as to the precise day of execution.

These authorities show that the time of execution is no part of a sentence of death; that a sentence of death, saying nothing about the time, is valid; that the power to fix the time of execution may, by statute, be vested in the governor or in the court.

In the absence of any statute in regard to fixing the time for executing a sentence of death, the court that passes the sentence can, probably, unless some other practice has obtained, fix the time of execution either by an order entered contemporaneously with, or subsequent to, the sentence.

The only statute governing the crime of murder, or the punishment therefor, within the District of Columbia seems to be section 5339 of the Revised Statutes of the United States, which provides, among other things, that

> Every person who commits murder within any fort, etc., or *district of country* under the exclusive jurisdiction of the United States * * * *shall suffer death.*

This section is applicable to murder committed within the District of Columbia. (*United States* v. *Guiteau*, 1 Mackey 498, 500.)

Under this section, presumably, Cross was sentenced to death by the Supreme Court at special criminal term. The statute says nothing about the time of executing the death penalty. Hence, if the sentence passed upon Cross at the special criminal term had said nothing about the day of execution it would have been a perfectly valid sentence. But the court, either by a contemporaneous order forming part of the sentence or by a subsequent order, fixed the day. It is unnecessary to inquire where the court got its power so to fix the sentence. It may be conceded that it had such power, derived from immemorial usage or practice. We concede too here for the sake of the argument only that the time so fixed was illegally postponed by a tribunal which had no power to act.

But it necessarily follows, in spite of these concessions, from the proposition that the time of execution is no part of the sentence of death, that the sentence of death remains, and is sufficient authority for holding the convict in confinement after the day fixed, by order of court or otherwise, has passed.

In 1 Bishop's Criminal Law, § 951, Ed. 7, it is said:

> The day on which death or other corporal pain is to be inflicted need not be inserted in the judgment. If it is not it may be in the warrant; or, *if it is in the judgment and execution fails to be done on that day*—as where the sheriff dies or the prisoner escapes, being afterward retaken—the court may direct it to be done on a subsequent day.

In the following cases it was decided that the convict was not entitled to go at large, though the day fixed for executing the death sentence had passed.

Owing to the death of the sheriff, the sentence was not executed on the day fixed. (*State* v. *Kitchens*, 2 Hill, S. C. Laws, 612.)

No execution on the day fixed, because of escape of the prisoner. (*Bland* v. *State*, 2 Ind., 608.)

In Ex parte Howard (17 N. H., 545) and *Ex parte Nixon* (2 S. C., 4) the day was postponed on respite from the governor. In both casesthe prisoners claimed the postponement was invalid, because there was no power in the governor to grant a respite. Waiving that point, and assuming the postponement illegal, it was decided in each case that the *sentence* was still in force, although no day for carrying it out was fixed.

Vide also *Wilkerson* v. *Utah* (99 U. S., 130, 137).

In conclusion and by way of summary, it is respectfully submitted—

First. This court has no jurisdiction of this appeal, because this is a civil proceeding, in which the sum of $5,000 is not involved.

Second. There is no statute authorizing appeals to this court from the Supreme Court of the District of Columbia in cases of habeas corpus, because the statute regulating such appeals and adopting for the District of Columbia the laws applicable to circuit courts of the United States did not adopt changes and alterations in the laws regulating appeals from such circuit courts, and at the time of such enactment there was no law justifying this appeal. If changes and alterations are adopted then the act of March 3, 1891, which takes away the right of appeal to this Court from circuit courts, has had a like effect as applied to appeals from the District of Columbia.

Third. The limitation of appeals from the District of Columbia to cases involving $5,000 applies to applications for the writ of habeas corpus.

It is also submitted that aside from the question of jurisdiction there is no merit in appellant's contention, because,

First. The execution of the sentence was lawfully postponed.